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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 MD Helicopters Incorporated,

10 Plaintiff,

11 v.

12 United States of America, et al.,

13 Defendants.
14

No. CV-19-02236-PHX-JAT

ORDER

15 At issue is AVX Aircraft Company's ("AVX") Motion to Intervene (Doc. 63), to
16 which Plaintiff MD Helicopters, Inc. ("Plaintiff") has filed a Response, (Doc. 69), and
17 AVX has filed a Reply, (Doc. 75). For the reasons set forth below and in the Court's
18 May 10, 2019 Order granting Sikorsky Aircraft Corporation's ("Sikorsky") Motion to
19 Intervene, (Doc. 49), the Court grants AVX's Motion.

20 **I. ANALYSIS**

21 AVX seeks to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), or,
22 alternatively, permissively under Fed. R. Civ. P. 24(b). (Doc. 63 at 2, 6).¹ Like Sikorsky,
23 AVX has been selected by the Army to enter into a Future Attack Reconnaissance Aircraft
24 Competitive Prototype ("FARA CP") agreement under the Other Transaction Authority
25 ("OTA") of 10 U.S.C. § 2371b, and has begun performance under this contract. (*Id.* at 2).
26 Counsel for Defendants United States of America, et al. ("Defendants") and counsel for
27 Intervenor Sikorsky have consented to AVX's Motion. (*Id.*). The Court will permit AVX

28 ¹ As the relevant legal standard is set forth in detail in the Court's May 10, 2019
Order (Doc. 49), it will not be recounted again here.

1 to intervene as a matter of right pursuant to Rule 24(a)(2) as AVX has demonstrated:
2 (1) that its Motion is timely; (2) that it has a protectable interest in the subject of this
3 litigation; (3) that the disposition of this action may impair or impede AVX's ability to
4 protect its interests; and (4) that the existing parties do not adequately represent AVX's
5 interests. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.
6 1997) (citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)).²

7 In its Response in Opposition to AVX's Motion to Intervene (Doc. 69), Plaintiff
8 does not raise any new arguments regarding the second and third elements (whether AVX
9 has a protectable interest in the subject of this litigation and whether the disposition of this
10 action may impair AVX's ability to protect its interests) of the *League of United Latin*
11 *Am. Citizens* test for intervention as a matter of right. As AVX has also been selected to
12 enter into a FARA CP OTA agreement, has invested significant time and resources in its
13 negotiations with the Army to reach a satisfactory OTA agreement, and has actually begun
14 performance under the FARA CP program, (Docs. 63 at 5; 75 at 4–5), the Court's findings
15 and holdings as to the second factor made in its Order ruling on Sikorsky's Motion to
16 Intervene (Doc. 49 at 4–6) apply with equal force to AVX's Motion here. Further, because
17 AVX is similarly situated to Sikorsky, AVX's interests could also be significantly impaired
18 if Plaintiff is successful in this suit. (Docs. 63 at 5–6; 75 at 5). Therefore, the Court defers
19 to the findings and holdings made in its Order ruling on Sikorsky's Motion to Intervene
20 (Doc. 49 at 6–8) as to the third factor, as well.

21 Plaintiff's opposition to AVX's Motion mainly stems from the first and fourth
22 elements of the *League of United Latin Am. Citizens* test for intervention as a matter of
23 right. (See Doc. 69 at 3). These elements are examined below.

24 **A. Whether AVX's Motion to Intervene is Timely**

25 Although Plaintiff contends that AVX cannot show that its Motion is timely, (*id.* at
26 3–4), the Court disagrees. Plaintiff filed its Complaint on April 5, 2019, (Doc. 1),
27 Defendants received notice of Plaintiff's suit on April 15, 2019, (Doc. 17-1), and AVX

28 ² As AVX is entitled to intervene as a matter of right under Rule 24(a)(2), the Court
need not consider whether it will permit AVX to intervene permissively under Rule 24(b).

1 filed its Motion to Intervene just over one month later on May 20, 2019, (Doc. 63). Further,
2 AVX's Motion was filed before Defendants answered, (*see* Doc. 71), and substantive
3 proceedings have still not taken place. (Doc. 63 at 3). As AVX points out, various courts
4 within the Ninth Circuit have permitted intervention on motions filed after similar
5 timeframes. (Doc. 75 at 3 (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397
6 (9th Cir. 1995) (holding that the district court did not err in permitting intervention as a
7 matter of right four months after the complaint had been filed as the "intervention motion
8 was filed at a very early stage, before any hearings or rulings on substantive matters"); *Gila
9 River Indian Cmty. v. United States*, No. CV10-1993 PHX-DGC, 2010 WL 4811831, at *2
10 (D. Ariz. Nov. 19, 2010) (motion for permissive intervention was timely where motion was
11 filed six weeks after commencement of action and where permitting intervention would
12 not disrupt the expedited litigation schedule); *Agua Caliente Band of Cahuilla Indians v.
13 Riverside Cty.*, No. EDCV1400007DMGDTBX, 2014 WL 12588284, at *2
14 (C.D. Cal. Apr. 21, 2014) (motion for intervention as a matter of right filed approximately
15 six weeks after commencement of action and less than a month after the defendants filed
16 their answer was timely))).

17 Further, permitting AVX to intervene will not prejudice the other parties or delay
18 the proceedings. AVX does not propose to make any additional written briefing in response
19 to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction
20 (Doc. 13/15), and does not seek to postpone the hearing on that Motion. (Doc. 63 at 4). In
21 opposition, Plaintiff contends that AVX's qualification that it does not seek to submit
22 additional briefing "at this time" suggests that "AVX may change its position to the
23 prejudice of the existing parties that did seek timely participation." (Doc. 69 at 4). Plaintiff
24 also states that if AVX later decides to submit further briefing this "could delay the
25 litigation or at least unnecessarily complicate the proceedings, thus prejudicing MDHI's
26 ability to enforce its rights." (*Id.*). Nevertheless, there is no indication that AVX will do so
27 here, as AVX joined Defendants' and Sikorsky's responses to Plaintiff's Motion for
28 Preliminary Injunction and TRO, stating that because these responses "present sufficient

1 reason for the Court to deny the Motion, AVX does not intend to submit further briefing
2 or written argument in opposition.” (Doc. 64 at 2).

3 Moreover, given the early stage of the proceedings, there has not been any undue
4 delay by AVX in filing its Motion to Intervene. *See Idaho Farm Bureau Fed’n*, 58 F.3d at
5 1397. Although Plaintiff states that “AVX provides no justification for waiting to seek
6 intervention until after: (1) briefing on MDHI’s Motion for TRO and Preliminary
7 Injunction concluded, and (2) Sikorsky’s intervention motion was fully briefed and
8 decided,” (Doc. 69 at 4), AVX explicitly noted in its Motion that it “is a relatively small
9 company, and the expense associated with the requested intervention was a significant
10 consideration[,]” (Doc. 63 at 4). Furthermore, Plaintiff’s argument that if “AVX wanted to
11 participate in this proceeding, it should have participated in the GAO proceedings”
12 (Doc. 69 at 4) is without merit; the Court finds no support for Plaintiff’s proposition that
13 parties seeking to intervene at the district court level must have participated in previous
14 administrative actions concerning the same suit. For these reasons, the Court finds that
15 AVX’s Motion to Intervene is timely.

16 **B. Whether the Existing Parties Do Not Adequately Represent AVX’s**
17 **Interests**

18 The fourth element also weighs in favor of AVX’s Motion to Intervene, as AVX
19 has met its “minimal” burden in demonstrating that representation of its interests by
20 existing parties “may be” inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086
21 (9th Cir. 2003) (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10
22 (1972)). For the same reasons discussed in the Court’s Order granting Sikorsky’s Motion
23 to Intervene, the United States does not adequately represent AVX’s interests. (*See* Doc. 49
24 at 9–11). Plaintiff asserts that because Sikorsky has “successfully intervened and is actively
25 participating in this litigation, the interests of all Phase 1 awardees are adequately
26 represented to the extent such interests were not already represented by the Army.”
27 (Doc. 69 at 5). According to Plaintiff, “AVX and Sikorsky both seek to preserve their Phase
28 1 awards and prevent MDHI from receiving one[,]” and that “is the extent of their


1 combined interest in this litigation.” (*Id.*). While it is true that Sikorsky and AVX are
2 “generally aligned in opposing MDHI’s claims,” Sikorsky cannot adequately represent
3 AVX’s interests because the two, as awardees of FARA CP OTA agreements, “are
4 ultimately competing against one another” for the award of a production contract.
5 (Docs. 63 at 6; 75 at 5). Plaintiff also contends that it is not challenging the award of any
6 Phase 1 awardee and that the outcome of this litigation “will not have any impact on the
7 competition between AVX and Sikorsky.” (Doc. 69 at 5). However, the Court again notes
8 that if Plaintiff is ultimately awarded a Phase 1 contract, AVX—like Sikorsky—will suffer
9 losses associated with the increased competition at Phase 1 because AVX will lose a
10 proportional share of its funding as the pool of FARA CP performers is increased.
11 (See Doc. 49 at 10 (citing Docs. 13-1 at 9–10, 14; 46 at 4)). Further, AVX’s chances at
12 ultimately receiving a production contract may be impaired. (See Doc. 13-1 at 9–11). As
13 AVX is competing with Sikorsky for a production contract, no current party can adequately
14 protect AVX’s interests.

15 **II. CONCLUSION**

16 For the foregoing reasons,

17 **IT IS ORDERED** that AVX’s Motion to Intervene (Doc. 63) is **GRANTED** to the
18 extent that the Court will permit AVX to intervene as a matter of right pursuant to
19 Fed. R. Civ. P. 24(a)(2).

20 Dated this 6th day of June, 2019.

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25 James A. Teilborg
26 Senior United States District Judge
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